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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

479

HILTON HOTELS (U.K.) LIMITED,

Petitioner,

—against—

JACK FRUMMER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Opinion Below

The opinion of the New York State Court of Appeals is officially reported in (19 N.Y. 2d 533; 281 N.Y.S. 2d 41; —— N.E. 2d ——). The opinion and the order and the remittitur as was amended by the Court of Appeals appear to be printed in the Appendix at pages 1a to 19a.

The decision of the Court of Appeals of the State of New York which denied reargument and granted the application to amend the remittitur as yet have not been officially reported but they appear in the Appendix at pages 2a to 21a.

So too, the opinion of the Appellate Division of the Supreme Court, Second Judicial Department affirming the

decision of the Supreme Court of the State of New York, County of Kings, at Special Term, have both been included in the Appendix (pages 22a to 28a), and the decision of the Appellate Division of the Supreme Court has been unofficially reported in 269 N.Y.S. 2d 688.

Jurisdiction

Jurisdiction of this Court is predicated upon 28 U.S.C. Section 1277, and the order of the Court of Appeals denying reargument but directing an amendment of the remittitur which appears in the Appendix (at pages 20a-21a).

Question Presented

DOES THE DECISION AND THE RESULTANT ORDER OF THE NEW YORK STATE COURT OF APPEALS JURIDICALLY FINDING THAT JURISDICTION EXISTS *IN PERSONAM* OF THE PETITIONER, A BRITISH CORPORATE ENTITY, OPERATING THE LONDON HILTON HOTEL IN LONDON (A WHOLLY OWNED SUBSIDIARY IN THE VAST HILTON HOTEL CHAIN AND ENTERPRISES THROUGHOUT THE WORLD), WHERE THE RESPONDENT, AS A RESULT OF HIS STAY AS A GUEST IN ITS HOTEL IN LONDON, WAS SERIOUSLY INJURED WHILE MAKING USE OF ITS FACILITIES DUE TO THE CLAIMED NEGLIGENCE OF THE PETITIONER IN THE OWNERSHIP, OPERATION AND MAINTENANCE OF SAID HOTEL, PREDICATED UPON ITS "TRANSACTION OF BUSINESS" IN THE TRADITIONAL SENSE IN THE STATE OF NEW YORK, BECAUSE OF THE ACTIVITIES ON ITS BEHALF BY HILTON SERVICE

CORPORATION, KNOWN AS THE HILTON RESERVATION SERVICE, TOGETHER WITH THAT OF THE HILTON CREDIT CORP. THAT HANDLES CARTE BLANCHE CREDIT CARDS (BOTH WHOLLY OWNED AND CONTROLLED SUBSIDIARIES OF HILTON HOTELS INC. AND HILTON INTERNATIONAL), THAT GENERATE AND GARNER ITS HOTEL BUSINESS IN THE STATE OF NEW YORK AND WHO ARE THE PROVERBIAL MAGNETS, WORKING "HAND-IN-GLOVE" TOGETHER, CONTRAVENE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

Statement

The respondent, an attorney at law actively engaged in the practice of law in Kings County for over forty years, attended a convention in London at the petitioner's hotel with reservations that were made for him here for his stay thereat and by various people who flew over to attend a particular convention and were present thereof. The plaintiff originally checked into defendant's hotel and was assigned to Room 2423 thereof and thereafter it was changed to Room 1922 when the subject accident complained of occurred. The respondent had checked in at the hotel on June 9th, 1963 and it was at the 12th while making use of the overhead shower and bathtub (a circular or ovular type modernistic bathtub, this being a new hotel that had just been recently constructed and opened—which was improperly and dangerously constructed from the point of view of safety and design, and devoid of accepted standardized safety guards for use by patrons) he was caused to slip and fall, sustained serious injuries requiring

received preliminary medical attention in London which he received through the intervention of the hotel establishment itself, that paid for the same, and when his injuries were ascertained to be as serious as they were, he was immediately ordered flown home and had to be admitted to a hospital in New York City. He stayed there for a considerable period of time, received constant care and treatment and medication both at the hospital and through his physicians, from which personal injuries he still continues to suffer.

For the purpose of brevity, the parent hotel, HILTON HOTEL INC., and HILTON HOTELS INTERNATIONAL, now known as HILTON INTERNATIONAL, both Delaware corporations and both duly qualified to do business in the State of New York, and was transacting business in the State, were personally served with process in the above action. Both appeared by the same attorney who interposed answers to the complaint denying material allegations of plaintiff's complaint concerning ownership, operation and control of the subject hotel where the accident occurred, to wit, in London, at the London Hilton Hotel.

This required a marked consideration and analysis of the corporate structure of the Hilton Hotel Chain and it was found that the petitioner was a long term (99 years) lessee of the London Hilton Hotel, a wholly owned subsidiary of Hilton Hotels International in turn wholly owned by Hilton Hotels Inc., the parent or "daddy" corporation and because of the method of operation of the petitioner in conjunction with the Hilton Reservation Service, known as Hilton Service Corp., and the Hilton Credit Corp., known as Carte Blanche, as well as the evidence assembled in connection with the operational activities of the parent

and subsidiary Hilton Hotel Corporations (Hilton Hotels Inc., and Hilton Hotels International, now Hilton International) in conjunction with these two wholly owned affiliates, i.e., the reservation and credit service, it was then decided to bring in the petitioner and acquire personal jurisdiction over it in accordance with the provisions of the Civil Practice Law and Rules of the State of New York (Section 313 CPLR), since it was found and concluded that there was sufficient "minimum contacts" within the State of New York to warrant holding said corporation personally in this jurisdiction.

After the petitioner went to the time and trouble of amending his complaint, over the continuous array of objections by the petitioner through counsel, personal service upon the secretary of said British corporate entity in London, England, was effected and thereafter the defendants (all of them) moved to dismiss the plaintiff's complaint allegedly in accordance with the Civil Practice Law and Rules of the State of New York (CPLR Section 3211a, subdivision 8) on the ground and theory that the Courts of the State of New York did not acquire jurisdiction over the petitioner since it was claimed that it was not here *in personam* so as to warrant and justify bringing it in through this media.

The primary court (Special Term, Supreme Court Kings County), denied the petitioner's application, an appeal to the Appellate Division of the Supreme Court, 2nd Judicial Department by petitioner resulted in an affirmance of the order made at Special Term; leave to appeal to the Court of Appeals was granted by said intermediate Appellate Court, the Court of Appeals after hearing argument and a submission of briefs affirmed the order of the lower court; denied the application by petitioner for reargument and for a rehearing, but did grant its application for and.

amendment of the remittitur so as to provide therein that the petitioners made a claim of a deprivation of its rights and of a violation of due process by the Court of last resort of the State of New York in arriving at said determination contrary to the 14th amendment of the Constitution of the United States, but instead had found that there had been no violation thereof. The petitioner has now moved this Court for a writ of certiorari asking it now for leave to review the entire matter.

Argument

THE PETITIONER, A FOREIGN DOMICILIARY, WAS "TRANSACTING BUSINESS" IN A TRADITIONAL SENSE WITHIN THE CONFINES OF THE STATE OF NEW YORK THROUGH ITS AGENT, HILTON SERVICE CORP., COMMONLY KNOWN AS HILTON RESERVATION SERVICE AND HILTON CREDIT CORP., ALSO KNOWN AS CARTE BLANCHE CREDIT CARDS, BOTH OF WHICH ARE WHOLLY OWNED SUBSIDIARIES OF HILTON HOTELS CORP. AND HILTON HOTELS INTERNATIONAL, NOW KNOWN AS HILTON INTERNATIONAL, THROUGH A SYSTEMATIC METHOD OF GENERATING AND GARNERING THE FLOW OF HOTEL BUSINESS THROUGH SAID AGENCIES IN QUESTION.

At the outset, the attention of this learned Court is called to the fact that in the application for this writ, the petitioner has, at various instances, made mention of the Hilton Reservation Service as being a subsidiary of the parent corporation of the Hilton vast empire chain but additionally has sought to create the impression that it operates or acts for some fifty non-affiliated hotels and

that its activities on behalf of all hotels is merely perfunctory and for the sole purpose of ferreting out the availability of hotel space and that is subsidized by the Hilton chain as well as the other so-called fifty non-affiliated hotels (pages 5, 6). There does not appear to be any basis for this particular impression sought to be created, but contrarily, the record well supports the fact maintained by the respondent and confirmed by the Supreme Court in New York, the intermediate Appellate Court, and the Court of Appeals, that the Hilton Reservation Service is the arm of the Hilton chain and is the garnering and projecting agent for the obtainance of hotel business in the State for the petitioner herein as well as other of the vast chain of establishments.

The alleged claim of the petitioner appears to be categorized threefold-wise.

First, that the Court of Appeals did not properly apply nor understand the doctrine that has been postulated by this learned Court in

International Shoe Company v. *Washington*, 326 U.S. 310 (1945);
McGee International Life Insurance Co., 355 U.S. 220 (1957);
Hanson v. *Denckla*, 357 U.S. 255 (1957).

It has been sought by the petitioner to argue that the doctrine of a foreign entity "transacting business" in the traditional sense, through "minimum contacts" in a state or area of non-origin by the thesis of the holdings referred to, were never intended to apply to the corporate structure and method of operation of the Hilton Hotel chain and more particular the petitioner herein, as a wholly owned subsidiary thereof.

Secondly, a further argument has been attempted to be projected that were the holding of the New York Court of Appeals to be applied to others similarly situated that an undue burden or hardship would be visited upon the petitioner or others in the area of constitutional offensiveness tantamount to a deprivation of its rights under the Federal Constitution.

Thirdly, the factual finding by the Court of Appeals of the State of New York that the Hilton Service Corp., commonly referred to as the Hilton Reservation Service, was the agent of the petitioner, is violative of the concept of the "wall of separability" dividing responsibility of parent for subsidiary or affiliate, or vice versa, and on that account, it is likewise constitutionally offensive to the rights of petitioner.

Taking each of the arguments separately, we state in answer to the petitioner's contention that the thesis of this Court's prior holdings enunciating the principle of responsibility of a foreign corporate entity to the forum of the aggrieved in the area that it engages in the regular "transaction of business" through the medium of "minimum contacts", in a state or area of non-origin, that this doctrinaire was formulated by this learned Court because of the verities of reality concerning that which was transpiring through the invading corporate activator elsewhere than its state of origin and it was concluded that in doing what it (the foreign entity) did and in engaging in transactions directly or indirectly through itself or through those acting on its behalf, jurisdiction over it *in personam* was obtained and overruled contentions generally raised by it claiming non-presence thereat which rendered it immune from suit and jurisdiction contrary to the standards of justice and fair play.

The overall test, of what constitutes "doing or transacting business" is a question of its activity that distinguishes

a mere shadow from the true object itself to denote its presence and though not laid down with any formula of strict exactitude, under such circumstances process served upon it is valid, binding, and effective against one, or be it a corporation or otherwise so engaging in that activity because of the regularity of transactions, or relationships known as "minimum contacts", so that it could not thereafter be heard to complain that it was not present in the forum that thereafter set in motion its machinery of judicial determination and resultant judgments. We believe that the compact thesis of the holdings of this Court has synthesized these all-inclusive concepts.

The petitioner has gone so far as to urge, as a basis for a grant of a writ to this Court, that the principles enunciated in the holdings referred to have been perverted and unduly enlarged by the Court of Appeals of New York in affirming the order finding its presence *in personam* in this State and by overruling its contentions.

The petitioner has extracted, out of context, language in

Hanson v. *Denckla, supra* (page 7);
International Shoe Company v. *Washington,* (page 9);
McGee v. *International Life Insurance Co., supra* (page 10);

to thereby pervert the meaning and the true impact of the holdings in question. Contrarily, they have been truly implemented realistically by the New York Court of Appeals, by virtue of the record herein, and if anything, the same gives living effect to the constitutional concepts crystalized therein.

As a matter of fact, this learned Court's holdings so pronounced by the authorities and adverted to, by infer-

ence or otherwise, were never intended to set a policy or a guideline precluding a finding of presence of a foreign domiciliary that acted through the medium of a duly constituted agent as the record and the irrefutable exhibits (pp. 65, 67, 8) here reveal, and as was justifiably found by the majority of the Court below.

The very dissenting opinion by Breitel, J., speaking for the minority view (a very broad judicial exercise and dissertation of generalized international corporate law) strongly diluted the position taken by that view when the Court observed (though somewhat strangely not adverted to and overlooked by the petitioner in this application) as it tacitly acknowledged and conceded as follows (15a):

> "While the circumstances in this case *are not as serious in their effect in permitting personal jurisdiction, because plaintiff is indeed a New York resident, and the Hilton enterprise is looked at in the large as a layman would view them, are so much 'present'*, the rules applied will not stay so limited." (Italics the writer's.)

Thus, previous holdings by this Court concerning the doctrine and application thereof of what constitutes "doing business" in the traditional sense, have not been traduced or violated so as to be constitutionally offensive, but instead put into living force and effect.

Further, as to the claim by the petitioner concerning hardship made by it the answer to that old proverbial "chestnut" has been stated time in and time out again and by this very Court tersely through Mr. Justice Black in *McGee* v. *International Life Insurance Co.* (355 U.S. 220, 223-1957) at 223, when speaking to the Court, about this very same argument said:

> "At the same time modern transportation and communication are measured much less burdensome for a party sued to defend himself in a state where he engages in economic activity."

And respondent wishes to add what Chief Judge Fuld, speaking for the New York Court of Appeals said, in answer to this plaint by petitioner thus as follows (5a):

> "We are not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in international trade. When their activities are broad, either directly or through an agent, it becomes as widespread and energetic as the activities in New York conducted by the Hilton U.K., they received considerable benefits from such foreign business and may not be heard to complain about the burdens."

We have also urged in the courts below in answer to this complaint by the petitioner that those who engage in these financial transactions should be held to accept civil responsibility incidental thereto and submit themselves to that jurisdiction rather to permit them to play "hide and seek" after they have enjoyed the financial fruits of general transactions that have been engaged in in the state of the forum that has been invoked to adjudicate the controversies of the parties. It does no particular harm to any defendant, especially the petitioner herein, but contrarily, within constitutional safeguards, requires him to live up to that responsibility as any other litigant similarly situated is so required to do. Between the balance of convenience and weight of burden of a foreign domiciliary defending a law suit in the forum that it has invaded and reaped the benefit of economic activity therein as against a resident who

would be obliged to travel to a forum thousands of miles away to enforce such rights against a "corporate colossus," the answer becomes quite self-evident. The financial strain and stress can be borne with greater ease and little burden upon the invader rather than the one who has been invaded.

As to the third contention by petitioner that the finding by the Court of last resort in New York that Hilton Service Corp.-Hilton Reservation Service was not in fact the agent of the petitioner, which findings affirmed the findings of the Court of original jurisdiction (Morrisy, J.—page 27a) and the Appellate Division of the Supreme Court, (page 23a-24a) the petitioner has asked this learned Court to grant a writ of review by way of certiorari in order to overturn and review questions of fact. The exhibits (pgs. 65, 67, 68) support the factual conclusions and have not been explained away by the petitioner. The agents scope of power is at least measured by the principal's grant of authority,

Nat. Rental v. *Szakhent,* 375 U.S. 311, 316 (1964),

and the exhibits and the record overwhelmingly support the New York Court's finding on agency.

Angel v. *Burlington,* 530 U.S. 183, 191-2, (1947);
Erie R. R. Co. v. *Tompkins,* 304 U.S. 64 (1938);
Central Contracting Co. v. *Maryland Cas. Co.,* (CA 3d 367 F. (2d) 341, 344, 1966);
Natl. Equipment Rental Ltd. v. *Reagen,* (CA 2d 338 F. (2d) 759, 762, 1964).

As we have always understood the firm policy of this Court, translated as it has been into various appropriate holdings in regard thereto, the nature of this type of application necessitates a total absence of an analysis and review of disputed questions of fact for consideration by this Court as a prerequisite to the grant of a writ, but rather it is matters that are of a unique or of far-reaching impor-

tance or of diversity of view between the Circuit Courts in the various states or those between the State Courts and the Circuit Courts, or any such other serious circumstances that under those situations a writ of certiorari is entertained and granted. The obvious purpose of requiring one to apply for a writ, as we understand it is through this very method this tribunal can avoid being beleaguered with matters beyond the pale and scope of that form of jurisdictional impropriety (reviewing questions of fact) so as to permit it, in turn, to determine matters of grave concern and of unique importance in these chaotic periods of our government domestically or those upon the world scene. This Court is not a court for the correction of findings of a factual nature, unless, for an obvious and exceptional nature, but it is one whose jurisdiction is concerned with the review of questions of law solely.

We believe that the late Mr. Justice McReynolds said very appropriately in regard to this subject matter over forty years ago what is decisive here:

> [*Southern Power Company* v. *North Columbia Public Service*, 263 U.S. 508, 509 (1924)]:
>
> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, primarily a question of fact. That is not the ground upon which we granted the petition, and if sufficiently developed would not have moved us thereto."
>
> See *McAllister* v. *U. S.*, 348 U.S. 19, 23-25, (1964) per Mr. Justice Frankfurter and the authorities cited therein at page 25.
>
> *Houston Oil Company* v. *Goodrich*, 245 U.S. 440, 441 (1917);

Graver Manufacturing Co. v. *Lende Co.*, 336 U.S. 271, 275 (1949);

Furness & Co. v. *Yang-Tsze Insurance Co.*, 242 U.S. 430, 434 (1917).

CONCLUSION

Since the petition fails to reflect (Rule 38, subdivision 5)

a) that the New York State Court of Appeals determination is in conflict with that of this learned Court on the matter of federal law or that

b) a conflict exists between the decisions of the Court of Appeal of New York with several other State Courts, or between it and a Federal Court of Appeals on a federal question and

c) and further, since the fundamental basis for the assignment of error by the petitioner, upon a crystalized appraisal thereof, is one primarily of its disagreement with the factual conclusion reached by the Courts in New York, determining as they did that the Hilton Service Corp.—otherwise known as Hilton Reservation Service, a wholly owned affiliate of Hilton Hotels Corp., and Hilton International Inc., now known as Hilton International, was its agent for generating a flow of business on a continuous basis for the petitioner herein in New York State, and this learned tribunal does not seek, by certiorari or otherwise, to review disputed questions of fact therefor

the basis for the issuance of a writ of certiorari has not been presented herein, and it should, therefore, be not granted.

For the foregoing reasons and considerations heretofore demonstrated, petition for Writ of Certiorari should in all respects be denied in addition to an allowance to the respondent of costs and of his printing expenses (Rule 32).

Respectfully submitted,

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